FILED
AUG 9 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1940.

No. 116

JOSEPH J. MASCUCH, *Petitioner,*

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF IN BEHALF OF PETITIONER

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Opinion Below.

The opinion of the Circuit Court of Appeals (R. 989-991) is now reported in 111 F. (2nd) 602.

ARGUMENT.

I.

The Government resists the Petition herein by reliance in the main, upon the theory that "petitioner is precluded" from urging in this Court such matter "not argued in the Circuit Court" (p. 2), and cites as authority *Helvering* v. *Wood,* No. 384, 1939 Term, decided February 26th, 1940. Upon a reading, that case is found to be neither in point

nor controlling here, for there, as distinguished from the case at bar, the matter sought to be raised in this Court for the first time, was not only expressly waived in petitioner's brief before the Circuit Court, but was not included in the assignments of error.

This Court on that score had occasion to comment:

> "For a wholly different reason, petitioner's argument based on § 22(a) must fail. The Board of Tax Appeals purported to place its decision solely on § 166 and § 167 of the Act. Petitioner in his assignments of error specifically mentioned only § 166 and § 167, not § 22(a). In his brief before the Circuit Court of Appeals petitioner expressly waived reliance upon any section other than § 166. Though petitioner in his petition for certiorari relied on § 22(a), respondent in opposition thereto took the position that that point was not available to petitioner here as it was not raised below. In view of these facts, especially the express waiver below, we do not think that petitioner should be allowed to add here for the first time another string to his bow" (*Helvering* v. *Wood, supra*).

Each and every point herein urged was assigned by petitioner as error in the Court below, viz., Point I, R. 978; Point II, R. 982; Point III, R. 939, 967; Point IV, R. 954; Point V, R. 976 and Point VI, R. 944, 952, 953, 963, 969-975.

Whether the matter was argued in the Court below is not the criterion. The assignment thereof as error furnishes the true test. As was said by this Court in *Sonzinsky* v. *United States,* 300 U. S. 506, 514:

> "We do not discuss petitioner's contentions which he failed to assign as error below."

To the same effect, *Saltonstall* v. *Birtwell,* 164 U. S. 54, 71.

II.

Petitioner's contentions urged under Point V (Br. 19) of his main brief, are entirely misconstrued by respondent.

Contrary to the Government's claims at page 5 of its brief that "in this connection petitioner asserts that the evidence failed to prove Assignment A of the first count and Assignment C of the second Count", petitioner upon his main brief argued that each assignment of perjury in both counts was not supported by the evidence and respectfully directed attention to his motion to dismiss (R. 482-520), where each assignment was separately treated and discussed as to insufficiency. It was only "in the interest of brevity" that "no attempt" was "made to review each assignment of perjury in both counts", since it sufficed for the purposes of the point under discussion, to demonstrate that any one assignment in each count was not supported by the evidence.

For like reason, there is hardly any justification for the claim upon page 7 of the Government's brief that petitioner "does not argue that there existed a failure of proof as to all of the assignments of perjury in each count, but merely that a particular assignment in each count was not established."

We agree with respondent that under the general rule, it is not necessary to support all the assignments in any given count of an indictment, to sustain such count. Obviously therefore, where a count contains several assignments and the prosecution sustains but one, the count as such cannot be dismissed. It would be encumbent upon the Court to sustain the count and submit for the jury's consideration the question of defendant's guilt on the sustained assignment contained in the count, withdrawing simul-

taneously those assignments which are not supported by the evidence.

This principle cannot be in conflict with the rule urged by petitioner, that the failure to withdraw from the jury's consideration those assignments in a given count which are unsupported by the evidence, requires a reversal of conviction on that count, since it cannot be determined upon which of the assignments in the count petitioner was found guilty.

In the case at bar, it may very well be that petitioner was convicted exclusively upon Assignment A of the first count and Assignment C of the second count, matters which among others, the Government failed to sustain beyond a reasonable doubt.

Rule and reason combine to prove such iniquity.

In *People* v. *Clarke*, 252 App. Div. 122, 124 (1937), it was said:

> "Since under the indictment, containing a single count, it can not be known upon which of these seven alleged statements the jury found the defendants to be guilty, the People, to sustain the conviction, are bound to maintain, and do maintain, that all the statements charged to have been false constituted statements of fact as distinguished from expressions of opinion. It follows that if one of the statements submitted to the jury as justifying the conviction of the defendants was merely the expression of an opinion not constituting any crime, then the judgment must be reversed, since the jury may have convicted the defendants exclusively on that ground."

III.

Respondent does not dispute the existence in the various Circuits of a conflict in the Federal Criminal Law, relating to the probative effect of evidence of defendant's good

character (Pet. Br. 7), justifying and requiring determination with finality by this Court.

But it is ingeniously sought to overcome the force of petitioner's point, by charging that:

> "petitioner neither excepted to the charge nor assigned error with respect thereto (R. 724-728, 939-983), and, consequently, he is not in a position now to complain thereof" (Resp. Br. 10).

It is to be noted that the error complained of and assigned (R. 978) was the failure and refusal of the Trial Court to charge as requested (R. 701), and this suffices to preserve for petitioner his right to assign error.

As was said in *Block* v. *United States,* 261 Fed. 321, 325:

> "If the plaintiff in error was dissatisfied with the charge, because of omitted matter, his remedy was to request the court to charge upon the matter omitted. It could not be reached by an exception."

Indeed, under Rule XXIV of the General Rules of the Southern District Court of New York, it is required that:

> "Prior to summing up in any jury trial, counsel must submit to the Judge in writing all requests for instructions. The Judge may, in his discretion, refuse to consider any request submitted too late under the foregoing provision."

This rule is obviously intended to call the Trial Court's attention to any possible error in the prospective charge and thus afford an opportunity for timely correction.

Under these circumstances, it is respectfully submitted that no exception to the Court's main charge was necessary, the Court having been apprised in advance of the charge, of petitioner's request and its attention having been called to the omission, following the main charge (R. 725).

IV.

The exclusion by the Trial Court of Defendant's Exhibit A (R. 927, 928) is justified by respondent with the bald assertion that it could have no "bearing upon the question of intent * * * in view of the abundant evidence that the petitioner wilfully testified falsely * * *" (Br. 11).

This view, patently, begs the question. Petitioner was entitled to have the jury, not the Government, determine what, if any, bearing this document had "upon the question of intent."

> "Intent is a state of mind difficult of precise proof and, therefore, evidence of other and surrounding circumstances may be received for the purpose of proving such intent." *Shreve* v. *United States,* 103 Fed. (2nd) 769, 803.

> "Criminal intent is essential to constitute the crime, and the testimony bearing thereon is always a question for the jury. (Duffy v. People, 26 N. Y. 588-593; Stokes v. People, 53 N. Y. 164; People v. Powell, 63 N. Y. 88; People v. Flack, 125 N. Y. 324.)" *People* v. *Wiman,* 148 N. Y. 29, 33.

This Court, in *United States* v. *Norris,* 300 U. S. 564, 576, has plainly indicated that an effort to correct a mistake or to elaborate an incomplete answer may suffice to demonstrate the absence of a wilfull intent to swear falsely.

Since the letter in question was offered not as a self-serving document to prove the statements therein contained but rather to corroborate positive evidence already adduced and further as an offer to correct, it was prejudicial error to deprive the defendant of the right to present to the jury competent and relevant evidence bearing upon his defense.

V.

Respondent is content to reject the claim of petitioner that he was deprived of his constitutional right to a fair trial as a result of the cumulative effect of the improper and prejudicial cross examination of character and other witnesses, the admission of circumstantial evidence and testimony by inference which imputed to him the commission of other unrelated offenses, with the observation that petitioner "fails to point out the particular cross-examination and evidence of which he complains" (Res. Br. 12). Reference to petitioner's main brief (p. 3) clearly indicates the particular instances in the record to which the point in question alludes, viz., R. 293, 523-536, 569, 575 and 589-634.

To the claim of petitioner (Point IV, Br. 17) that he was entitled to a mistrial as a result of the conduct of Juror No. 4 which the Trial Court itself labelled "improper", the Government, without explanation or attempt at justification, suggests "that the admonitions of the Trial Judge corrected any possible prejudice" (Res. Br. 12).

Mindful that the incident occurred at the very outset of the trial so that the declaration of a mistrial at that point could work no hardship upon either side, and that in the absence of any showing by either side to demonstrate beyond question that the error complained of is prejudicial, it is respectfully urged that the defendant is entitled to a presumption that such error was prejudicial so as to require a reversal.

As was said in *Ah Fook Chang* v. *United States,* 91 Fed. (2nd) 805, 810:

> "Finally if the record shows error, but does not disclose whether the error is prejudicial or whether it is not prejudicial, it is presumed to be prejudicial and to require reversal."

A reading of the colloquy between Court and counsel (R. 268-275) demonstrates that the usefulness of the juror in question was entirely impaired and that at his hands the defendant could not obtain his constitutional right to a trial by an impartial jury.

Conclusion.

It is respectfully submitted that the Petition should be granted as prayed for.

Dated: New York, August 8th, 1940.

Respectfully submitted,

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